In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 325

V. F. BOND AND AUDREY A. BOND, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum findings of fact and opinion of the Tax Court (R. 175a–182a)[1] are unreported. The opinion of the Court of Appeals (Pet. 2a–10a) is reported at 232 F. 2d 822.

JURISDICTION

The judgment of the Court of Appeals was entered on April 9, 1956. The time for filing a petition for a writ of certiorari was extended to August 20, 1956, by order of Mr. Justice Black dated July 9, 1956. (Pet.

[1] Record references are to the Appendix to the taxpayer's brief in the Court of Appeals.

1a.) The petition for a writ of certiorari was filed on August 16, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the record sustains the determination of the courts below, based on increases in the taxpayer's [2] net worth, that there were deficiencies in income tax for the years 1942–1947.

2. Whether the record sustains the determination of the courts below that a part of the deficiency for each year was due to fraud with intent to evade the tax, subjecting the taxpayer to the 50 percent fraud penalty.

STATUTES INVOLVED

The pertinent provisions of the Internal Revenue Code of 1939 (Sections 41, 54, and 293) and the Internal Revenue Code of 1954 (Section 7454) are set forth in the Appendix, *infra,* pp. 8–9.

STATEMENT

The facts, as found by the Tax Court (R. 176a–178a), and as stated by the Court of Appeals (Pet. 2a–6a), may be summarized as follows:

The taxpayer, V. F. Bond, was a resident of Arlington, Virginia, during the years in question. He filed an individual return for the taxable year 1942, and he and his wife filed joint returns for the remaining

[2] Mrs. Bond's activities and income are not in controversy, and she is interested only because joint returns were filed for all taxable years except 1942; therefore, Mr. Bond alone will be referred to as the taxpayer.

years in issue, 1943 through 1947, all with the Collector of Internal Revenue for the District of Virginia. (R. 176a; Pet. 4a.)

The taxpayer operated a retail coal and lumber business, a hotel business, a restaurant, a filling station, and a fuel oil business during the years in issue. He also built, remodeled, and sold houses and dealt extensively during the last two years in issue in second trust notes secured by real property. Taxpayer employed a bookkeeper but personally prepared much of the information from which his attorney made up his income tax returns each year. (R. 176a–177a; Pet. 4a.)

The Commissioner determined that the returns which the taxpayer filed did not correctly reflect his true income and, by use of the net worth and expenditures method, determined that he received income far in excess of that reported on his returns. The taxpayer does not contest the Commissioner's right to use the net worth method. He concedes that his books were inadequate. (R. 177a; Pet. 4a.) Those for 1940 to 1943 had been destroyed prior to 1947 when the examination began (Pet. 6a). During the years in issue he maintained no inventory records (Pet. 5a).

There is set forth in the findings of the courts below (R. 177a; Pet. 5a) a tabulation showing the reported income for the years in issue, also the increases in net worth and the Commissioner's determination of income for those years.

The Tax Court found that the taxpayer received the amounts of income as determined by the Com-

missioner with certain modifications which are no longer in controversy. The Tax Court also upheld the Commissioner's imposition of the 50 percent fraud penalty for the years in issue under Section 293 (b) of the 1939 Code, finding as an ultimate fact that part of the deficiencies for each year was due to fraud with intent to evade tax. (R. 178a; Pet 6a.) The Court of Appeals affirmed (Pet. 2a–10a).

ARGUMENT

The decision below, affirming that of the Tax Court, is clearly correct. There is no conflict of decisions, and there are no grounds calling for further review. The issues raised in the petition for certiorari are essentially factual in character, and the Court of Appeals upheld the findings of the Tax Court. "A seasoned and wise rule of this Court makes concurrent findings of two courts below final here in the absence of very exceptional showing of error." *Comstock* v. *Group of Investors,* 335 U. S. 211, 214; *Corn Products Co.* v. *Commissioner,* 350 U. S. 46, 51. There is no such showing in the instant case.

1. The Court of Appeals rightly upheld the Tax Court's determination of deficiencies based upon increases in net worth. Conceding that his books were inadequate and that it was proper to employ the net worth method of computing income (R. 177a; Pet. 4a), the taxpayer's only objection to the Tax Court's determination is grounded upon the exclusion of certain alleged assets from opening net worth. Taxpayer contends (Pet. 6–7) that assets consisting of improvements to real estate and an asset in the form of in-

ventory were erroneously excluded. The courts below rejected that contention largely on grounds of failure of proof. They both concluded (R. 179–181a; Pet. 7a–8a) that taxpayer failed to show that he had actually made improvements or had inventories in the amounts claimed or that inventories had varied from year to year.[3]

The courts expressed grave doubts as to whether the alleged real estate improvements were, in fact, capital in nature rather than deductible expenses in the year made; indeed, the record indicates that taxpayer actually claimed as expenses and deducted from income the cost of whatever improvements were made at the time they were made. (R. 180a; Pet. 7a–8a.) The courts were justified in giving weight to the inconsistency in the taxpayer's position. *Orange Securities Corp.* v. *Commissioner,* 131 F. 2d 662 (C. A. 5th); and see *Commissioner* v. *Mellon,* 184 F. 2d 157, 160 (C. A. 3d); *Crosley Corp.* v. *United States,* 229 F. 2d 376, 380 (C. A. 6th).

As to the exclusion of inventories from the net worth computation, the Court of Appeals aptly said (Pet. 8a–9a):

> We think this result is neither clearly erroneous nor arbitrary, when it is considered that taxpayer admittedly kept no inventory records; that he was unable to prove the inventory figures which he claimed; and that, in the light of

[3] In this connection, taxpayer had the burden of proof. *Carmack* v. *Commissioner,* 183 F. 2d 1 (C. A. 5th), certiorari denied, 340 U. S. 875; *Bryan* v. *Commissioner,* 209 F. 2d 822 (C. A. 5th), certiorari denied, 348 U. S. 912.

> this and taxpayer's exaggerations as to other items, the Commissioner concluded that at best, these figures were haphazard guesses.
>
> Taxpayer has admitted that uniform elimination of inventories throughout the net worth computation, if relatively constant, had no appreciable effect on the computation. It is apparent that taxpayer has not proved that such inventories, if they existed, were not relatively constant. The Tax Court's conclusion must be sustained.

In the circumstances, there is plainly no adequate basis for taxpayer's assertion (Pet. 6) of conflict with *Holland* v. *United States,* 348 U. S. 121, 132, since the taxpayer failed to prove that he had any substantial assets that were omitted from the opening net worth.

2. Taxpayer's contention (Pet. 6–7) that the fraud penalty was wrongfully imposed is without merit, and there is no conflict with *Wiseley* v. *Commissioner,* 185 F. 2d 263 (C. A. 6th), where the court found factors which explained to its entire satisfaction the errors in the taxpayer's returns.

Both of the courts below recognized that the Commissioner had the burden of proof as to this issue (Internal Revenue Code of 1954, Section 7454, Appendix, *infra,* p. 9) and both of them held that the burden was carried. (R. 181a–182a; Pet. 9a–10a.) Not only were there consistent understatements of income in large amounts over a period of years but there were other factors summarized as follows by the Court of Appeals (Pet. 10a):

> * * * the size and extent of taxpayer's operations; his method of personally preparing much of the data and summaries for his attorney to use in preparing his tax returns; his questionable testimony; and the absence of ordinary business records, many of which had been destroyed sometime prior to this examination. All these, we think, lend ample support to the Tax Court's finding.

The decision below is in line with many others where fraud penalties have been imposed, such as *Kilpatrick* v. *Commissioner,* 22 T. C. 446, affirmed, 227 F. 2d 240 (C. A. 5th); *Lee* v. *Commissioner,* 227 F. 2d 181 (C. A. 5th), certiorari denied, 351 U. S. 982; *Bodoglau* v. *Commissioner,* 230 F. 2d 336 (C. A. 7th); *Koscove* v. *Commissioner,* 225 F. 2d 85 (C. A. 10th); *Rogers* v. *Commissioner,* 111 F. 2d 987 (C. A. 6th); *Canton* v. *United States,* 226 F. 2d 313 (C. A. 8th), certiorari denied, 350 U. S. 965; *Vassallo* v. *Commissioner,* 23 T. C. 656. And we know of no decision that could fairly be said to be conflicting.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER, 1956.

APPENDIX

Internal Revenue Code of 1939:

SEC. 41. GENERAL RULE.

The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. If the taxpayer's annual accounting period is other than a fiscal year as defined in section 48 or if the taxpayer has no annual accounting period or does not keep books, the net income shall be computed on the basis of the calendar year.

(26 U. S. C. 41.)

SEC. 54. RECORDS AND SPECIAL RETURNS.

(a) *By Taxpayer.*—Every person liable to any tax imposed by this chapter or for the collection thereof, shall keep such records, render under oath such statements, make such returns, and comply with such rules and regulations, as the Commissioner, with the approval of the Secretary, may from time to time prescribe.

* * * * *

(26 U. S. C. 54.)

SEC. 293. ADDITIONS TO THE TAX IN CASE OF DEFICIENCY.

* * * * *

(b) *Fraud.*—If any part of any deficiency is due to fraud with intent to evade tax, then 50

per centum of the total amount of the deficiency (in addition to such deficiency) shall be so assessed, collected, and paid, in lieu of the 50 per centum addition to the tax provided in section 3612 (d) (2).

(26 U. S. C. 293.)

Internal Revenue Code of 1954:

SEC. 7454. BURDEN OF PROOF IN FRAUD AND TRANSFEREE CASES.

(a) *Fraud.*—In any proceeding involving the issue whether the petitioner has been guilty of fraud with intent to evade tax, the burden of proof in respect of such issue shall be upon the Secretary or his delegate.

(26 U. S. C. [1952 ed. Supp. III] 7454 (a)).

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